IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 2180 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ASHOKBHAI C.MISTRY & 1 - Applicant(s)
Versus
THE STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MS AMEE YAJNIK for Applicant(s) : 1 - 2.
PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE KS JHAVERI

Date : 08/03/2007

ORAL JUDGMENT

1.0 Rule. Learned A.P.P. waives service of rule on behalf of respondent State.

2.0 The petitioners have approached this Court seeking anticipatory bail as they are apprehending their arrest in connection with the FIR registered as M. Case No.1 of 2006, earlier, Inquiry Case No.69 of 2006 filed in the Court of the Metropolitan Magistrate, Court No.13, Ahmedabad. One Bhavanbhai Rabari has filed a private complaint against the petitioners for offences punishable under Sections 141, 147, 149, 383, 395, 397, 440, 452, 506(2) and 120-B of the Indian Penal Code and under Section 25(c) of the Arms Act.

3.0 The brief facts of the case are that the applicants, herein, are dealing in the business of scrap obtained by demolition of buildings. According to the applicants in the year 2006 they came to know that the Natraj Cinema was being demolished, the resultant scrap had to be removed. The applicants, therefore, contacted one Yogendrabhai Patel who was looking for some

agency for the aforesaid work. According to the applicants, since the price offered by them was acceptable to Yogendrabhai Patel, the said work was assigned to them and an agreement came to be executed on 30.03.2006 between Yogendrabhai Patel on behalf of Natraj Cinema and the applicants, for removal of scrap.

3.1 In pursuance to the said agreement, the the applicants started the work on 01.04.2006, on the said premises. According to the applicants, during the course of demolition of the Cinema Hall, one of the walls of the said Cinema Hall suddenly collapsed, resulting into throwing of debris in all the directions, creating a great cloud of dust all over the Ashram Road. On account of the said mishap, the applicants as well as Yogendrabhai Patel were issued notices by the Town Development Officer, West Zone, Ahmedabad Municipal Corporation directing them to take services of some expert. Therefore, the applicants requested one Shri Amit Gajjar, an

engineer and technical expert to guide them on the way in which the demolition work was required to be carried out on the said premises.

3.2 According to the applicants, thereafter, they came to know that Devnashi Enterprise @ Dairy Den, a firm owned by Harish F. Shah has instituted Civil Suit No. 988 of 2006 in the Small Causes Court, Ahmedabad against Natraj Cinema and Yogendrabhai Patel on the ground that the aforesaid demolition work was affecting his business. In the said suit, a 'Commission Report' was prepared on 10.05.2006 in which it was mentioned that Dairy-Den was having some dispute with Natraj Cinema for which it had filed the aforesaid suit in which several interim orders were passed by the Small Causes Court in favour of Devanshi Enterprise @ Dairy-Den.

3.3 According to the applicants, although, the work of demolition was carried out by them on the said premises, they were not made party to

the aforesaid suit by Dairy-Den and since no notice was displayed by the Dairy-Den mentioning about the interim relief granted by the Small Causes Court in their favour, the applicants were not aware of any dispute between Dairy-Den and Natraj Cinema or any protection granted to Dairy-Den by the Small Causes Court.

3.4 On 14.06.2006 during the course of the work one huge lift cell toppled down and on account of that some local residents of Mithakali village which happens to be in the vicinity of Natraj Cinema, registered a complaint with the Police Station at Navrangpura. In response to the complaint, the Police Inspector, Navrangpura recorded statements of applicant No.1 and other persons and got an assurance from applicant No.1 that due care will be taken in future.

3.5 The case of the applicants is that the work carried out by them on the said premises was

well within the public knowledge as well as in the knowledge of Devanshi Enterprise and in spite of that no notice was ever issued or any objection was raised by Devanshi Enterprise or its employees at the relevant time against the work carried out by the applicants.

3.6 According to the applicants, Devanshi Enterprise, thereafter, filed another suit being Civil Suit No.1639 of 2006 and this time also the applicants were not made party to the said suit and Natraj Cinema and Yogendrabhai Patel alone were made parties to the said suit.

3.7 Thereafter, about in the month of September, 2006 the applicants came to know that premises of Natraj Cinema partially occupied by some persons having small shops thereon were vacating the same, on an assurance of compensation from Natraj Cinema. Accordingly, by the first week of October, 2006, the whole premises was peacefully vacated by the said

occupants/tenants of shops etc. on the said premises. The applicants, thereafter, undertook the remaining work of demolition and finished the same on 08.10.2006.

4.0 In pursuance to the above the applicants came to know that one Bhavanbhai Desai-present respondent No.2 has filed four different police complaints against various persons with the Navrangpura Police Station. Thereafter, on 17.10.2006, respondent No.2 had also filed a criminal case before the learned Metropolitan Magistrate, Court No.13, Ahmedabad including the present applicants for offences punishable under Section 415, 141, 47, 149, 383, 395, 397, 452, 506(2) read with 120(B) of the Indian Penal Code and Section 25(c) of the Arms Act.

4.1 In connection with the same, a report came to be filed by the Police Inspector, Navrangpura showing that the goods alleged to have been plundered from Natraj Cinema were found

from the factory premises of the Dairy-Den/ Devanshi Enterprise. In pursuance to that, on 05.12.2007, the Deputy Commissioner of Police filed a report for deleting the Section 395 and 397 of the Indian Penal Code and for altering the sections of the Arms Act.

4.2 The case of the applicants is that they were working on the said premises as per the agreement executed between them and Yogendrabhai Patel on behalf of Natraj Cinema and that they are not in any way connected with the offence in question. Since, the applicants are apprehending their arrest in connection with the complaint filed by respondent No.2, they have preferred the present application.

5.0 On behalf of the State and complainant, a preliminary contention is raised to the effect that the petitioners have approached this Court without approaching the Court of Sessions and their application for anticipatory bail filed

directly in the High Court may not be entertained in view of two decisions of this Court rendered in the case of ***"Ramchandra Kashiram Vora Vs. State of Gujarat"*** reported in 1987 (1)GLR 85 and another decision in the case of Harivallabha Parikh Vs. State of Gujarat, reported in 1997(1) GLR 638. It is submitted on behalf of the State that as per the ratio laid down in both the above stated two decisions, a person apprehending his arrest should, in normal circumstances, approach the Sessions Court at first instance and ordinarily an application for anticipatory bail must be made to the Sessions Court instead of approaching the High Court directly.

6.0 As against this, Dr. Amee Yajnik, learned Advocate for the applicants has submitted that Hon'ble Division Bench of this Court has taken a view in the case of ***"Rameshbhai Lallubhai Luni Vs. Devraj Bhalabhai and Ors."*** reported in 1998(1)GLR 109 that when a right is given to a party to choose one or the other forum, he must

be taken to be the best judge as to the forum which would be more convenient to him. The Statute has provided concurrent jurisdiction to the Court of Sessions as well as to the High Court. Dr. Yajnik, has further submitted that though the above stated decision of the Division Bench was rendered while considering the provisions of Section 439(2)of the Code of Criminal Procedure, 1973, the provisions of Section 438 as well as Section 439 both are provided concurrent jurisdiction to the Court of Sessions as well as to the High Court.

7.0 It is further submitted that while deciding the anticipatory bail in the matter where the concerned FIR was registered in another State than the State of Gujarat, this Court has taken the same view in the case of ***Santoshbhai Gunvantrai Kamdar & Another Vs. State of Rajasthan"*** reported in 1991 GLH (UJ) 9 that the person having reasonable apprehension of arrest can move the High Court or the Court of Sessions

to grant him immediate relief by way of direction as contemplated by the provisions of Section 438 of the Code.

8.0 She has also drawn the attention of this Court to another decision of this Court reported in 1998(2)GLR 1640 in the case of ***"Nella J. Shah Vs. State of Gujarat & Another"***, that ordinarily an application for anticipatory bail must be made to the Sessions Court or the High Court within whose local jurisdiction the offence in question is committed. This was also a case wherein the FIR was registered in the State of Maharashtra. However, the person apprehending arrest approached the High Court directly wherein this Court held that with a view to provide immediate relief so as to enable the applicant to approach the Court of Sessions or the High Court, within whose territorial jurisdiction the offence alleged to have been committed, the Court may entertain the application and the order to release for a short time.

9.0 To appreciate rival contentions of both the sides, it is necessary to reproduce Sections 438 and 439 of the Code of Criminal Procedure, 1973.

> "**438.** Direction for grant of bail to person apprehending arrest.-(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session, for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.
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> (2) When the High Court or the Court of Session makes direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-
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> (i) a condition that the person shall make himself available for interrogation by a police officer as and when required;
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> (ii) a condition that a person shall not, directly or indirectly, make any inducement, treat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
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> (iii) a condition that the person shall

not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that Section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).”

“**439.** Special powers of High Court or Court of Sessions regarding bail.-(1) A High Court or Court of Session may direct-

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified;

provided that the High Court or the Court of Sessions shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court

> of Session or which though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice.
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> (2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody."

9.1 It can be seen that Section 438 of the Code of Criminal Procedure, 1973 gives power to the High Court or the Court of Sessions for a direction under the Section where any person has reason to believe that he may be arrested.

9.2 Section 439 of the Code of Criminal Procedure, gives special power to the High Court or to the Court of Sessions regarding bail when the person concerned is in judicial custody. Similarly Section 439(2) of the Code already gives power to the High Court or the Court of Sessions to give direction to arrest any person who is released on bail under Section 439. The Statute nowhere puts any restriction that a

person should first approach the Court of Sessions and then only to the High Court.

9.3 The Division Bench of this Court in the case of ***"Rameshbhai L. Luni"***(Supra) has held that once the concurrent jurisdiction is conferred without limiting the choice of the forum to which a party may take recourse, no practice which runs counter to the provision can be countenanced. Considerations of appropriateness cannot be allowed to arise in such a case. When a right is given to a party to chose one or the other forum, he must be taken to be the best judge as to the forum which would be more convenient to him. It is further held that the High court cannot take away the choice which the Legislature has given to the party in respect of the forum to be taken recourse to by him. This decision of the Division Bench of this Court is till the date holding the field.

10.0 Though, there is concurrent jurisdiction

of the High Court as well as the Court of Sessions, in the case of ***"Ramchandra K. Vora"***(Supra)this Court has taken the view that the High Court as well as the Court of Sessions has jurisdiction to grant anticipatory bail. However, as a matter of practice in the first instance in normal circumstances, the applicant-accused must approach the Sessions Court. It is further held that in exceptional cases, which are rare indeed, the High Court would entertain the application under Section 438 of the Code in the first instance.

10.1 Similar view is taken by this Court in the case of ***"Harivallabh Parikh"***(Supra). It is true that the High Court and the Court of Sessions have concurrent jurisdiction under Section 438 of the Code of Criminal Procedure, for grant of bail to the person apprehending arrest. But considering the convenience, smooth and effective functioning of the Court, it is always desirable that at the first instance, the

application is made to the Court of Sessions.

10.2 It appears that in both the above stated two decisions, this Court has mainly taken into consideration the convenience and a matter of practice. In both the aforesaid devisions, this Court has expressed that it is always **desirable** that at the first instance, the application is made to the Court of Sessions. The Division Bench decision in the case of ***"Rameshbhai Luni"*** (Supra)is subsequent to the decision in the case of ***"Ramchandra K. Vora"***(Supra)given by the learned Single Judge of this Court. The Division Bench has also taken into consideration the said decision of the learned Single Judge. The question before the Division Bench was regarding the cancellation of the bail as per the provision of Section 439(2) of the Code of Criminal Procedure, 1973. A similar contention was raised that the applicant of that case who had approached the High Court directly for cancellation of the bail without approaching the

Court of Sessions. Dealing with the said contention, the Division Bench has held as under,

> "The Parliament must be assumed to have considered all the implications of conferring concurrent jurisdiction on two Courts, one superior and the other inferior and must then have deliberately and advisedly conferred the concurrent jurisdiction. Once the concurrent jurisdiction is conferred without limiting the choice of the forum to which a party may take recourse no practice which runs counter to such a provision can be countenanced. In our view consideration of the appropriateness cannot be allowed to arise in such a case. When a right is given to a party to choose one or other forum, he must be taken to be the best Judge as to the form which would be very convenient to him. We feel, with due respect, that the choice which the Legislature has given to a party in respect of the forum to be taken recourse to by him, cannot be taken away by the High Court even for the reasons mentioned in the aforesaid decision in 1972 Cr.L.J.1607".

10.3 The Division Bench of this Court was called upon to decide the reference as to whether the application for cancellation of the bail which was made directly to the High Court without first approaching the Sessions Court was

maintainable or not. The Division Bench ultimately considering all the aspects answered the question referred to it to the effect that the High Court can and should entertain the application for cancellation of the bail under Section 439(2) of the Code of Criminal Procedure, directly i.e. even if the applicant has not approached the Sessions Court.

11.0 In the case on hand, considering the analogues provisions of Section 438 and 439 of the Code of Criminal Procedure, the decision of the Division Bench of this Court is binding to this Court since both Sections 438 and 439 give concurrent jurisdiction to the High Court as well as the Court of Sessions. Moreover, the decision of the learned Single Judge in the case of ***"Ramchandra K. Vora"***(Supra) was referred to by the Division Bench and thereafter taking contrary view, impliedly over-ruling the decision of the learned Single Judge reported in 1987(1)GLR 85.

12.0 In the case of ***"Nella J. Shah"***(Supra), reported in 1997 (1)GLR 638, though the learned Judge has taken the view that normally the application for anticipatory bail must first be made before the Sessions Court, instead of approaching the High Court directly, has not considered or referred to the judgment of the Division Bench in the case of ***"Rameshbhai Luni"***(Supra).

13.0 Even otherwise, considering the case on hand, in view of the decision of the learned Single Judge that in exceptional cases, the High Court would entertain application of anticipatory bail in the first instance, then also looking to the facts of the present case, the petitioners who have approached this Court at first instance, are not required to be relegated to the Court of Sessions.

14.0 The special and exceptional circumstances are as under:

(i) The applicants are residents of Ahmedabad,

(ii)The Court of Sessions as well as the High Court are also easily accessible,

(iii)Police station is also in Ahmadabad,

(iv) Other co-accused of the same complaint have also approached this Court for quashing of the complaint and for anticipatory bail and in matters where the Sessions Court have granted anti bail, the complainant has come for cancellation of the bail. All these applications are before this Court for hearing and the Investigating Officer is also attending the Court with the papers. In short, this Court is ceased of the matter and hence, it will be absolutely of no use to send the petitioners to the Sessions Court just to follow a practice,

(v) The Investigating Officer remained present on each and every date of hearing

of the above applications filed by the co-accused.

15.0 So far as the facts of the case against the applicants are concerned, on perusal of the FIR, the complainant has made four different versions regarding the incident in question. The names of the petitioners are not reflected in the first version. In the second version, he has mentioned 7 names along with two unknown persons. However, this versions has been given in writing by him to the Police Inspector on the same day but it is devoid of time and is too vague. The third version which is before the Police Sub-Inspector of Navrangpura Police Station on the same day does not name the present petitioners. The fourth version also on the same day, does not mentioning the names of the petitioners.

16.0 Thus, prima facie it appears that the present petitioners are roped in for no fault of theirs just because they happen to be scrap

lifters of the premises in question. They are having a valid agreement with the accused NO.1 who is a lease holder of the land in question and the agreement is for limited purpose of removing this scrap pursuant to the demolition of the erected structure. In no way these petitioners are connected with the alleged offences. The presence of the petitioners at the site is most natural in view of the agreement signed between them and accused No.1 and there is no allegation against the petitioners with regard to any covert act except their presence. Hence, this application deserves to be allowed and the same is allowed accordingly.

17.0 In the event of arrest of the applicants in connection with M. Case No.1 of 2006 of Navrangpura Police Station, they shall be released on bail in respect of offence/s alleged against them in this application on their executing a bond of Rs.10,000/- (Rupees ten thousand only)with one surety of the like

amount,by each of them independently, by the concerned Police Officer and on conditions that they shall:

[a] remain present before the Trial Court regularly as and when directed on the dates fixed;

[b] appear before the concerned Police Station, on any day, within a period **FOUR WEEKS** from today between 9.00 am and 2.00 pm.

[c] make themselves available for interrogation by a Police Officer, whenever and wherever required;

[d] not directly or indirectly make any inducement, threat or promise to any person acquired with the fact of the case so as to dissuade him from disclosing such facts to the Court or to any Police Officer;

[e] not to obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

[f] at the time of execution of bond, furnish the address to the Investigating Officer and the Court concerned and shall not change their residence till the final disposal of the case or till further orders;

[g] not leave Gujarat without the prior permission of the concerned Court/I.O. and, if having passport, shall deposit the same before the Trial Court within a week.

18.0 It would be open to the Investigating Officer to file an application for remand, if he considers it proper and just, and the concerned Magistrate would decide it on merits.

19.0 This order will hold good if the applicant is arrested at any time within 90 days from today. The order for release on bail will remain operative only for a period of ten days from the date of his arrest. Thereafter, it will be open to the applicant to make a fresh application for being enlarged on bail in usual course which when it comes before the competent Court, will be disposed of in accordance with law, having regard to all the attending circumstances and the materials available at the relevant time uninfluenced by the fact that anticipatory bail was granted.

20.0 Rule is made absolute. Direct service is permitted.

[K.S. JHAVERI, J.]

Umesh/